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No. 06-1384

In The

Supreme Court of the United States

SERDAR KALAYCIOGLU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE JURY MUST BE INSTRUCTED ON THE ELEMENTS OF THE SUBSTANTIVE OFFENSE THAT IS THE OBJECT OF AN ALLEGED CONSPIRACY?

WHETHER THE GOVERNMENT MUST PROVE, AND THE JURY MUST DETERMINE, THE EXISTENCE OF A FIDUCIARY DUTY PROHIBITING THE CONDUCT ALLEGED TO BE PRIVATE SECTOR HONEST SERVICES FRAUD AND ACTUAL OR INTENDED HARM TO THE VICTIM?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, SERDAR KALAYCIOGLU, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, affirming his judgment and sentence entered in these proceedings, with rehearing and suggestion of rehearing en banc denied Janua 31, 2007.

OPINION OF THE COURT BELOW

The written opinion of the Court of Appeals for the Eleventh Circuit is included in the appendix. *United States v. Kalaycioglu*, No. 04-12339 (11th Cir. Dec. 11, 2006). [App. 1.]

JURISDICTION

The opinion of the Court of Appeals was entered on December 11, 2006. [App. 1.] The timely petition for rehearing and suggestion for rehearing en banc was denied on January 31, 2007. [App. 27.] This petition is filed pursuant to Rule 13, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

APPLICABLE PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations. . . .

18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20

> years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346 provides:

> For the purpose of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to resolve conflicts in the circuits on two, in this case interrelated, issues: (1) how a jury in a criminal case must be instructed where the defendant is charged with conspiracy, and (2) what the government is required to prove for a charge of honest services fraud. The Eleventh Circuit held that the jury in a conspiracy case need not be instructed on the definition or elements of the underlying substantive offense, and that jury instructions on conspiracy to commit honest services wire fraud were adequate even though the district court removed the determination of the nature of the duty owed from the jury and ruled that a fiduciary duty existed as a matter of law. [App. 1.]

Serdar Kalaycioglu is a Canadian resident and a Canadian citizen since 1991. He also has Turkish citizenship because he was born in Turkey. Dr. Kalaycioglu has a Ph.D. in Mechanical Engineering, specializing in space robotics, and worked for several years for the Canadian Space Agency. Dr. Kalaycioglu is also President of Bensa Systems, a Canadian corporation which he formed in the 1990s to help companies and individuals obtain financing.

Dr. Kalaycioglu was charged in a 14-count Superseding Indictment on April 10, 2003 with various charges arising out of transactions between Dr. Kalaycioglu and individuals who approached him about investing in certain financial programs. The only count addressed in this petition is Count 14, which charged Dr. Kalaycioglu and three co-defendants with violation of 18 U.S.C. §§ 1343, 1346, 371 and 2. This count arose out of a government sting operation code-named "Bermuda Shorts," and alleged conspiracy to commit wire fraud to deprive another of "honest services" by arranging, or conspiring to arrange, a kickback for representatives of a fictitious English mutual fund in return for investing with the defendants.

Bermuda Shorts. In 2001, the FBI expanded its existing "Bermuda Shorts" undercover operation to include the activities at Meridian Investment Bank ("MIB"). FBI Special Agent Michael Palasek represented himself as the American representative of an English mutual fund. The record shows that Palasek's primary contact with MIB was through co-defendants Sheldon Mickelson and Mario Turcotte. Dr. Kalaycioglu had relatively little involvement in the interactions and transactions between the undercover agents and MIB beyond explaining the investment program to them. The agents first raised the idea of a kickback with Mickelson and Turcotte. It was decided to arrange a "commission" or "consulting fee" by way of a consulting arrangement. Dr. Kalaycioglu was never part of any conversations with the agents regarding the consulting agreement. However, Palasek testified that Mickelson and Turcotte told him that it was Dr. Kalaycioglu's idea to have a consulting agreement.

According to Palasek, Dr. Kalaycioglu expressly stated that the clients would not be compromised by payment of that consulting fee or commission. Moreover, according to Rick Carson, MIB's former President and a cooperating

government witness, an attorney participated in the conversations with Dr. Kalaycioglu regarding this "commission," and expressly stated that such a commission was legal. Carson also believed that at least some level of commission was permitted by the applicable law. Dr. Kalaycioglu testified that he never understood that the fee arrangement or commission discussed was in any way illegal or improper. He relied on the attorney, who told him that the fee was legal under applicable law.

The government agents told Mickelson and Turcotte that they wanted to do a $20,000.00 "test trade" before they committed any more money. Dr. Kalaycioglu was not involved in arranging the $20,000.00 test trade through MIB. Turcotte personally delivered the promised $10,000.00 commission to Agent Palacek in Florida. The commission came from Turcotte and Mickelson's own money – not out of the client's funds. Even Carson was not told that the $10,000.00 payment was being made. After receiving that payment, Agent Palacek never had any phone conversations including Dr. Kalaycioglu which would indicate that Dr. Kalaycioglu was aware that such a payment had been made.

Jury Instructions. The defense proposed a special jury instruction for Count 14 which required the jury to determine the existence of a fiduciary duty, and then defined fiduciary duty as a term of art in the traditional manner, with language adopted from the civil jury instructions. [App. 31-32.]

Defense trial counsel also provided the district court with uncontradicted evidence that if this had been an actual, rather than a fictitious, English mutual fund, the undisclosed commission would not have been improper or illegal under English law. This included submission of an excerpt from the trial transcript of a related Bermuda

Shorts case, of expert testimony that in England, where mutual funds are not strictly regulated as they are in the United States, the relationship and expectations between the investors and the manager of such a fund are quite different than in this country, and are largely determined by a management agreement. According to that evidence, it is common and legal for such agreements to permit the fund manager to accept compensation from the seller of a security that in this country would be considered an illegal "kickback."

The district court rejected the defense's proposed instruction, finding the type of "fiduciary duty" which the government must prove is a more general duty, and not a true "fiduciary duty" as typically understood in the law, and that a general duty of loyalty from employee to employer is sufficient. [App. 41-43.] Therefore, over defense objection, the district court instructed the jury on conspiracy to commit honest services fraud based on the Eleventh Circuit's Pattern Jury Instruction 51.2. [App. 44-46.] That instruction stated that "the Government must prove that the employee or agent intended to breach a fiduciary duty, and that the employee slash agent foresaw or reasonably should have foreseen that the employer/principal might suffer an economic harm as a result of that breach." [App. 45.] However, the district court then determined a fiduciary duty existed and determined the nature and scope of that duty as a matter of law, telling the jury that "[u]nder the law every agent or employee" has "a fiduciary duty" to their employer. [App. 46.]

Verdict and Sentencing. The jury found Dr. Kalaycioglu guilty on 12 of the charged counts, and not guilty on Counts 8 and 9. Although a first-time offender, Dr. Kalaycioglu was sentenced to a total of 324 months' imprisonment, because the district court ruled that the amount of loss was over $40 million – taking that number from the

amount the "Bermuda Shorts" sting claimed they could invest for the fictitious English mutual fund. [App. 24-25.] He is currently incarcerated.

Dr. Kalaycioglu appealed his judgment and sentence to the Eleventh Circuit Court of Appeals on several grounds, including that the jury instruction on conspiracy to commit honest services fraud was error and the court should have given the defense's proposed jury instruction. A panel of the Eleventh Circuit Court affirmed the conviction and sentence on all grounds. [App. 1-23.]

On the issue of the jury instruction on conspiracy to commit honest services fraud, the panel rejected Dr. Kalaycioglu's argument on two grounds: (1) Dr. Kalaycioglu was charged with conspiracy, not the substantive offense of honest services fraud, and therefore was not entitled to have the jury instructed on the elements or definition of honest services fraud; and (2) even if the court were required to define honest services fraud, the instructions as given adequately covered the object of the alleged conspiracy. [App. 11.] Dr. Kalaycioglu's timely motion for rehearing and suggestion of rehearing en banc was denied without further opinion on January 31, 2007. [App. 27.]

REASONS FOR GRANTING THE PETITION

This case involves the confluence of conflicts between the circuits on two points of law: (1) the extent to which jury must be instructed on the criminal offense that is the object of the charged conspiracy under 18 U.S.C. § 371, and (2) where that object offense is honest services wire fraud under 18 U.S.C. §§ 1343 and 1346, the essential elements of that offense. The decision of the Eleventh Circuit Court of Appeals in this case conflicts with the decisions of other circuit courts on both these issues. Supreme Court review is necessary to provide uniformity

and to protect the constitutional rights of those charged with these crimes.

I

THERE IS A CONFLICT IN THE CIRCUITS ON WHETHER THE JURY MUST BE INSTRUCTED ON THE CRIMINAL OFFENSE THAT IS THE OBJECT OF AN ALLEGED CONSPIRACY.

The Due Process Clause of the Fifth Amendment and the Sixth Amendment right to trial by jury require that the jury determine that the defendant is guilty of every element of a crime beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995). In order for that to occur, the jury must be fully and accurately instructed on every element of the charged offense. This case involves the proper application of these principles where the charged offense is conspiracy – because conspiracy involves not one but two crimes: (1) the crime of conspiracy itself, and (2) the crime that is the object of the conspiracy. The Eleventh Circuit opinion in this case holds that while a district court "should ordinarily instruct the jury concerning the object of an alleged conspiracy," such an instruction is not required and failure to so instruct is not error. [App. 11.] This ruling conflicts with decisions of at least three other circuits and is contrary to the requirements of the Fifth and Sixth Amendments as interpreted in this Court's case law.

Case law has defined the elements of the offense of conspiracy under 18 U.S.C. § 371 as: "(1) that an agreement existed between two or more persons to commit a crime; (2) that the defendant knowingly and voluntarily joined or participated in the conspiracy; and (3) a conspirator performed an overt act in furtherance of the

agreement." *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 128 (U.S. 2006).

Thus, a key element of conspiracy is the specific intent to commit a crime. *United States v. Blair*, 54 F.3d 639, 642 (10th Cir.), *cert. denied*, 516 U.S. 883 (1995). But not just any crime – the specific crime charged in the indictment. *Id.* In order for the jury to determine whether there was an agreement and specific intent to commit that specific crime, the jury must be instructed on the legal standards applicable to that specific crime.

The seminal case in this area is *Ingram v. United States*, 360 U.S. 672 (1959). *Ingram* involved charges of conspiracy to evade payment of federal taxes imposed on lottery operations. Two of the petitioners, Ingram and Jenkins, ran a profitable large-scale gambling business in Atlanta with the aid of several others, including two other petitioners, Smith and Law. Ingram and Jenkins were liable for federal taxes on the business, Smith and Law were not. *Id.* at 675-76. However, under the indictment all four were charged with conspiracy to evade federal tax laws because of Ingram and Jenkins' failure to pay those taxes.

This Court affirmed the convictions of Ingram and Jenkins, but held that the convictions of Smith and Law should have been reversed. *Id.* at 681. "There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation." *Id.* at 678. There was nothing in the record to indicate that Smith and Law knew that Ingram and Jenkins were liable for those federal taxes, or that those taxes had not been paid.

"'Without knowledge, the intent cannot exist.'" *Id.* (citation omitted). Thus, the knowledge and intent required to prove conspiracy to commit a crime is determined by the knowledge and intent required to prove the object crime. "'[C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.'" *Id.* (citation omitted).

The Fifth Circuit addressed this issue and applied the requirements of *Ingram* in *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.), *cert. denied*, 474 U.S. 908 (1985). In *Harrelson*, the defendants were convicted of conspiracy to murder a federal judge. One defendant, Elizabeth Chagra, requested an instruction of the elements of first degree murder – *i.e.*, premeditation and malice aforethought. The district court denied that request, instructed the jury only on the elements of conspiracy, including the element that the defendant participate knowingly and willingly, and did not instruct the jury on the elements of murder.

The Fifth District Court reversed. "Chagra was charged in her indictment with conspiracy to commit first degree murder; first degree murder requires the criminal intent of premeditation and malice aforethought. It was therefore incumbent upon the government to prove Elizabeth Chagra had that criminal intent and incumbent upon the trial court so to instruct the jury." *Id.* at 1173.

In the subsequent appeal after remand, the Fifth Circuit Court elaborated on that ruling: "What is required is that the defendant agree with another to accomplish an illegal objective and that at the time of agreement the defendant also have the state of mind required to commit the substantive crime." *United States v. Chagra*, 807 F.2d 398, 401 (5th Cir. 1986), *cert. denied*, 484 U.S. 832 (1987). In other words, the defendants cannot "knowingly and

voluntarily" make or participate in an agreement to commit a crime if they do not have the knowledge and intent required to commit that substantive crime.

The Tenth Circuit took a similar approach in the recent case of *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007). In *Lake*, the defendants were charged with several crimes, including conspiracy to commit wire fraud, money laundering, and circumvention. The charges were based on an alleged fraudulent scheme to conceal their personal use of corporate aircraft from the United States Securities and Exchange Commission ("SEC"). The court reversed the conspiracy convictions because the jury was never instructed regarding the SEC's reporting requirements for personal use of aircraft. *Id.* at 1250.

Discussing the jury instructions on conspiracy, the court noted that "[t]he jury could not accurately evaluate the conspiracy allegations without being informed regarding what was required to be in the SEC filings." *Id.* at 1263. Moreover, the SEC requirements were

> a critical part not only with respect to conspiracy to commit wire fraud (because no crime would be committed unless the SEC filings were false or fraudulent), but also conspiracy to commit money laundering (which requires wire fraud as a predicate offense) and conspiracy to circumvent (because the conspirators must have agreed to commit an offense that requires knowing and willful circumvention of internal controls instituted to satisfy SEC requirements).

Id. The case of *United States v. Szur*, 289 F.3d 200 (2d Cir. 2002), provides an example of how the jury should be instructed where the charge is conspiracy to commit honest services wire fraud, following the dictates of *Ingram*. The government alleged that the defendant brokers deprived purchasers of a certain stock of their right to the

brokers' honest services "by concealing their exorbitant commissions and by affirmatively misrepresenting that the commissions were small." *Id.* at 209. The district court instructed the jury on "the circumstances under which the brokers would be under a legal duty to disclose the commissions to their clients." *Id.* at 210. The court defined those circumstances as when "a fiduciary or other similar relation of trust and confidence between the parties" existed. *Id.* The court then explained in some detail when someone is held to be in a fiduciary relationship and told the jury that "[w]hether a fiduciary relationship exists is a matter of fact for you, the jury to determine." *Id.*

By contrast, the Eleventh Circuit has taken a very different approach in a series of recent cases culminating in the use at bar. In *United States v. Silvestri*, 409 F.3d 1311 (11th Cir.), *cert. denied*, 126 S.Ct. 772 (2005), the defendant was charged with conspiracy to commit acts of money laundering of the proceeds of mail and wire fraud.[1] The defendant challenged his conviction on the basis that the jury was not instructed on "(1) the specified unlawful activity of mail and wire fraud and (2) the conspiracy object of promotional money laundering." *Id.* at 1337. The court ruled this was invited error as defense counsel not only failed to object to the jury instructions but affirmatively accepted them. *Id.* However, in a footnote the court also ruled that the instructions given were sufficient to withstand the plain error standard:

> The district court instructed the jury that violation of 18 U.S.C. § 1341 (mail fraud) or 18 U.S.C. § 1343 (wire fraud) constituted the specified unlawful activity for purposes of the money

[1] The elements of mail fraud under § 1341 and wire fraud under § 1343 are identical except for the means of communication. *E.g.*, *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 n.12 (D.C. Cir.), *cert. denied*, 525 U.S. 961 (1998).

> laundering charges. It further explained that § 1341 "makes it a crime or offense for anyone to use the United States mails in carrying out a scheme to defraud," and that § 1343 "makes it a federal crime or offense for anyone to use an interstate wire communications facility in carrying out a scheme to defraud." Although the district court did not define the terms "defraud" or "promote," we are satisfied that these terms are well "within the common understanding of the jury" and therefore need not be defined.

Id. n.17 (citations omitted). Thus, in *Silvestri*, the Eleventh Circuit held it was not plain error, where the defendant is charged with conspiracy to launder money obtained through mail or wire fraud, to fail to instruct the jury on what constitutes mail or wire fraud, and found that the definition of what it means to "defraud" is within the common understanding of jurors.

The following year in *United States v. Martinelli*, 454 F.3d 1300 (11th Cir. 2006), *cert. denied*, 2007 WL 435720 (U.S. Mar. 19, 2007), the court took *Silvestri* a step further in another case involving conspiracy to launder money obtained through mail fraud. The defendant challenged his conviction based on the district court's failure to instruct the jury on the elements of mail fraud, including defining the terms "scheme to defraud," "fraudulent," and "material fact." Again, however, defense counsel failed to properly preserve this issue for appeal. *Id.* at 1310.

The Eleventh Circuit Court held that not only was this omission not plain error, it was not error at all because the defendant "was not charged with mail fraud and the government did not have to prove he committed mail fraud to convict him of conspiring to lauder money." *Id.* at 1311. The court noted that the district court in that case had provided a more detailed instruction than in *Silvestri*

by paraphrasing the language of the mail fraud statute for the jury. Moreover, the court found there was no prejudice because "the district judge made it clear that Martinelli had to know the proceeds were derived from the specified unlawful activity of mail fraud." *Id.* at 1312.

Judge Cox filed a special opinion, in which he concurred in the result because it was mandated by *Silvestri*. *Id.* at 1320 (Cox, J. specially concurring). However, he opined that *Silvestri* was wrongly decided, and vigorously disagreed with the majority's conclusion that the district court did not err by failing to instruct the jury on the elements of mail fraud. *Id.* at 1322. According to Judge Cox, "*Silvestri* and its application in this case threaten a defendant's right to a jury verdict beyond a reasonable doubt, because they place too much faith in jurors' common understanding." *Id.* Moreover, while it is true that the government did not have to prove the elements of mail fraud, it was required to prove, beyond a reasonable doubt, "that the monies it accused Martinelli of conspiring to launder were, in fact, proceeds of mail fraud." *Id.* n.3.

In the Eleventh Circuit Court's decision in the case at bar, the court has now taken this rationale even further. *Silvestri* and *Martinelli* both involved charges of conspiracy to launder money derived from a crime, and both were decided under the plain error standard. This case, however, involved a charge of conspiracy to commit honest services wire fraud, not money laundering, and defense counsel not only objected, but specifically requested an instruction defining the elements of honest services wire fraud. [App. 31-32.]

Conceptually the charges in these cases present analogous situations, as recognized by the Tenth Circuit court in *Lake*. 472 F.3d at 1263. Where the charge is conspiring to launder the proceeds of a specific crime, the

jury must find that specific crime was in fact committed and that the defendant knew the proceeds of that specific crime were being laundered. Where the charge is conspiring to commit a specific crime, the jury must find that the actions of the conspirators, if completed, would have constituted that specific crime. For both, the jury must understand that specific crime in order to make those determinations.

However, there is at least one significant distinction between this case and *Silvestri* and *Martinelli*: This case involved not just wire or mail fraud, but private sector honest services wire fraud. While arguably the general definition of fraud may be within the common understanding of most jurors, that simply cannot be said of honest services fraud, especially as applied to the private sector. Most jurors would not intuitively understand what it means for a private individual to deprive another of the intangible right to honest services. Indeed, as discussed *infra* at II, the courts themselves have not settled on a consistent definition of private sector honest services fraud. Judge Cox's prediction that the Eleventh Circuit's rulings in *Silvestri* and *Martinelli* would threaten the defendant's right to a jury verdict beyond a reasonable doubt on all elements of the offense, because they place too much faith in the jurors' common understanding, has unfortunately been fully realized in this case.

Other circuits, such as the Fifth and the Tenth, recognize that the jury simply cannot accurately evaluate and determine the intent of the defendant to conspire to commit an offense unless they understand the requirements of the law regarding that underlying offense. Without that understanding, the jury cannot determine beyond a reasonable doubt the intent element of the crime of conspiracy. A defendant "can be guilty of conspiracy to commit an offense without committing the substantive

offense itself." *Lake*, 472 F.3d at 1263. This is because "the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed." *United States v. Feola*, 420 U.S. 671, 694 (1975). However, the law still requires that the conduct agreed upon by the conspirators, if completed, must constitute a crime.

If the conduct agreed upon does not constitute a crime and if the conspirators did not have the intent required to satisfy the intent element of the object offense, then they cannot be found guilty of conspiracy. Therefore, while the jury need not determine that the object crime has actually been committed to find the defendant guilty of conspiracy, the jury must determine if a crime could have been committed pursuant to the conspiratorial agreement. The jury simply cannot make that determination without a complete understanding of the legal standards applicable to the object offense – in this case, honest services fraud.

The Eleventh Circuit has taken the premise that conspiracy and the substantive offense that is the object of the conspiracy are two separate crimes, and the premise that the object offense need not actually have been committed for the defendant to be guilty of conspiracy, and concluded that this means the jury need never be instructed on the legal standards applicable to the object offense. The Eleventh Circuit has added 2 + 2 and come up with 5. It is a conclusion that conflicts with the law of at least three other circuits and this Court's opinion in *Ingram*, and which seriously threatens the Fifth and Sixth Amendment rights of all defendants charged with conspiracy. This petition presents an appropriate case for this Court to resolve this conflict over a legal issue that affects the fundamental fairness of our criminal process.

II

THERE IS A CONFLICT IN THE CIRCUITS OVER THE PROPER APPLICATION OF HONEST SERVICES WIRE FRAUD, 18 U.S.C. §§ 1343 AND 1346, TO THE PRIVATE SECTOR.

If the jury in a conspiracy case must be instructed on the elements of the object offense in order to be able to determine intent to conspire beyond a reasonable doubt, then this case presents additional problems. Because Dr. Kalaycioglu was charged with conspiracy to commit honest services wire fraud, the jury had to be instructed on the elements of honest services wire fraud under 18 U.S.C. §§ 1343 and 1346, as the object of the alleged conspiracy. However, the Eleventh Circuit Court in this case stated that the jury instruction given was "sufficient," even though it failed to fully explain to the jury the elements of honest services wire fraud and determined the existence and scope of the duty owed as a matter of law. The Eleventh Circuit Court's approval of this instruction, which was based on the Eleventh Circuit's Standard Jury Instructions, places that court squarely in the conflict among the circuits over precisely what the government must prove for honest services fraud in the private sector. Indeed, "[a]lthough a number of circuits have upheld section 1346 against a claim of facial vagueness, there is now wide disagreement among the circuits as to the elements of the 'honest services' offense." *United States v. Rybicki*, 354 F.3d 124, 162 (2d Cir. 2003) (en banc) (Jacobs, Walker, Cabranes, Parker, Circuit Judges, dissenting), *cert. denied*, 543 U.S. 809 (2004).

The circuit courts disagree about what type of relationship must exist to give rise to a duty under this statute, how that relationship and duty is determined, and what constitutes a breach of that duty. Most importantly

when viewing honest services fraud in the context of a charge of conspiracy, the courts also disagree as to what *mens rea* must be proven by the government to turn a private sector breach of duty into a criminal offense. This case presents a perfect opportunity for this Court to clarify this extremely murky area of the criminal law, and provide uniformity so that a defendant cannot be convicted in one circuit based on conduct that would not constitute a federal crime in another.

History of Section 1346.

The mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, criminalize "any scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses." Prior to 1987, the federal courts read those statutes as criminalizing not only schemes for obtaining tangible money or property, but also "schemes to deprive another of the 'intangible right of honest services.'" *E.g.*, *Rybicki*, 354 F.3d at 133.

Then in 1987, this Court overruled that case law in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, this Court surveyed the history of the mail and wire fraud statutes, and held that the scope of the mail fraud statute, § 1343 (and therefore the wire fraud statute by implication), was only intended to protect tangible property rights. 483 U.S. at 356.

Congress then enacted § 1346 in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988). That statute was intended to reinstate the application of the mail and wire fraud statutes to at least one category of intangible rights, *i.e.*, the intangible right of honest services." *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). Since that time the federal circuit and district courts have struggled to interpret this new

provision, relying primarily on their pre-*McNally* case law. As a result, the circuits have fractured on at least three interrelated issues: (1) the requisite standard of intent for this crime; (2) the duty that must exist to come under § 1346 and the source of that duty; and (3) when breach of that duty constitutes a deprivation of "honest services" under this statute. All three are implicated by the jury instruction approved by the Eleventh Circuit in this case.

Intent under Section 1346.

Even a superficial survey of the case law shows that there is no clear understanding among the circuit courts as to the standard of intent for honest services fraud. For example, several circuits, including the Eleventh, state that the government must prove the defendant "intended to breach a fiduciary duty." *United States v. DeVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *see also United States v. Vinyard*, 266 F.3d 320, 329 (4th Cir. 2001) (the defendant "need only intend to breach his fiduciary duty"), *cert. denied*, 536 U.S. 922 (2002). Some merely require a showing of "fraudulent intent" or "intent to defraud." *United States v. Sun-Diamond Growers*, 138 F.3d 961, 974 (D.C. Cir.), *cert. denied*, 525 U.S. 961 (1998); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997). The Second Circuit describes the intent required as "the intent to deprive another of the intangible right of honest services." *Rybicki*, 354 F.3d at 145.

The jury instructions given in this case told the jury the government must prove intent to breach a fiduciary duty. [App. 45.] However, intent to breach a fiduciary duty,

of necessity, must include knowledge that a fiduciary duty existed and that the conduct would breach that duty. *See Ingram*, 360 U.S. at 678. The jury was not instructed on knowledge of either, as the district court rejected the defense's proposed instruction which explained fiduciary duty to the jury. [App. 29-43.] Yet, the uncontradicted evidence in the record showed that Dr. Kalaycioglu did not know that Palasek, the purposed American agent of an English mutual fund, had a fiduciary duty not to accept a commission for investing through MIB. The jury instruction given did not adequately instruct the jury on the applicable standard of intent for honest services fraud, even under the Eleventh Circuit's own interpretation on § 1346, and was in conflict with other circuits' interpretation of that statute.

Furthermore, for many circuits the standard of intent is inextricably intertwined with the concept of breach of duty. Therefore, to understand the elements of intent for honest services fraud, the jury must be fully instructed on duty and breach for the purposes of that statute.

Duty under Section 1346.

The issue of what duty must exist for a private sector relationship to come within the ambit of § 1346 underlies everything about this statute. By far the majority of criminal cases prosecuted under this statute involve the public sector – bribery or self-dealing by public officials and employees. In such cases, the duty is clear: "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *DeVegter*, 198 F.3d at 1329. This is a "strict duty of loyalty." *Id.* The Eighth Circuit put it another way: "In a democracy, citizens elect public officials to act for the

common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated." *Jain*, 93 F.3d at 442.

"Although the honest services theory of mail fraud is directed primarily at the deterrence and punishment of corruption among public officials, the courts have consistently recognized the statute's province to encompass dishonest acts perpetrated in private commercial settings." *Vinyard*, 266 F.3d at 326. However, application of this statute to private sector relationships is problematic. "[A] strict duty of loyalty is not part of private sector relationships. Most private sector interactions do not involve duties of, or rights to, the 'honest services' of either party." *DeVegter*, 198 F.3d at 1328. Private sector "[r]elationships may be accompanied by obligations of good faith and fair dealing, even in arms-length transactions. These and similar duties are quite unlike, however, the duty of loyalty and fidelity to purpose required of public officials." *Id.*

The statute itself provides no guidance as to what types of private sector relationships are encompassed by the honest services fraud statute. Again the circuits disagree. Some circuits require that a fiduciary duty exist between the parties. *Frost*, 125 F.3d 366; *Sun-Diamond Growers*, 138 F.3d at 974; *see also DeVegter*, 198 F.3d at 1329. Others expressly disagree. *See United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000) (government is not required to prove breach of fiduciary duty for § 1346). Indeed, some circuits more broadly apply the statute to all employer/employee relationships. *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir.), *cert. denied*, 522 U.S. 1028 (1997). The Second Circuit, taking the broadest approach, holds the statute applies where there is a duty owed by "an officer or employee of a private entity," or by "a person in a relationship that gives rise to a

duty of loyalty comparable to that owed by employees to employers." *Rybicki*, 354 F.3d at 141-42.

Applying § 1346 to all those in employer/employee or comparable relationships runs the serious risk of criminalizing a whole range of conduct previously handled solely by tort and contract law. Every act of dishonesty by an employee arguably deprives the employer of that worker's "honest services." However, as a policy matter, should every such dishonest act be converted into a federal crime by the mere use of the mails or interstate wire communications? Did Congress really intend § 1346 to regulate all employer/employee or similar relationships?

Requiring that a fiduciary relationship exist seems more appropriate – as it recognizes that while most private sector relationships do not carry the heavy duty of loyalty and disclosure imposed on public officials, some private sector relationships do impose such duties. In a different, but related, situation, this Court stated that

> one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.

Chiarella v. United States, 445 U.S. 222, 228 (1980).

However, using the term of art "fiduciary duty" cannot be the end of the analysis. There are different fiduciary duties: for example, the duty of loyalty, the duty to disclose, and the duty of care. *See Frost*, 125 F.3d at 367-69; *United States v. Lemire*, 720 F.2d 1327 (D.C.Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). Sometimes those are set forth in statute or precedent for particular relationships. *E.g.*, 29 U.S.C.A. § 1104 (ERISA fiduciary duties include

the duty of care, the duty of skill, the duty of prudence, and the duty of diligence); Fla.Stat. § 608.4225 (managers of limited liability companies owe duty of loyalty, duty of care, and duty of good faith and fair dealing to the company and all of the members). Often, however, the parties by agreement can change the fiduciary standard from that provided by the statute. *E.g.*. Fla.Stat. § 608.423 (members of limited liability company may enter into an operating agreement to establish additional duties).

Second, "a fiduciary obligation is not to be lightly implied, lest it undercut the basic principles of commercial law." *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006). "To label someone a fiduciary is to impose on that person obligations additional, and often contrary to, the ordinary allocations of responsibility that govern commercial transactions." *Id.* Therefore, "[b]efore the rigors of the criminal law may be imposed, the [defendant] should reasonably be on notice that he has entered into a relationship with his customer that gives him heightened responsibilities." *Id.*

The question then arises: How to determine whether a fiduciary duty exists in a particular case? The circuits disagree on this point as well. Some circuits have expressly ruled that federal law governs the existence of a fiduciary duty for the purposes of § 1346. *DeVegter*, 198 F.3d at 1329; *Frost*, 125 F.3d at 366. Theoretically, that may mean § 1346 applies only where federal law imposes fiduciary duties on the parties. Other courts have looked to state law. *Brumley*, 116 F.3d at 735. Still others are silent, or recognize that "[t]he duty breached need not arise from state or federal law, in particular, it may stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee." *Lemire*, 720 F.2d at 1335-26.

Because of the almost infinite variations possible in the relationships between private parties, the determination of what duties were owed in a particular case does not easily lend itself to determination as a matter of law. For example, in *Morda v. Klein*, 865 F.2d 782 (6th Cir. 1989), the district court heard extensive evidence on trade practices, contractual arrangements, and course of dealing between the parties in determining the nature of the fiduciary relationship between the parties. This is a very fact intensive determination and more appropriately belongs to the jury.

It is necessary to determine the nature and scope of the relationship between the parties to determine if, in fact, the duties owed under that particular relationship have been breached. If no duty is owed, then no breach occurs or is intended. If no breach occurs or is intended, then there has been no deprivation of honest services. If there has been no intended deprivation of honest services, then there can be no conspiracy to deprive of honest services. Thus, the determination of the nature and scope of the relationship between the parties, and the duties owed, is key. The existence of a duty under this statute must be an element of this offense, or at the very least is an essential aspect of the element of intent. If the jury is not properly instructed on duty, it cannot determine whether the defendant breached a known duty, intended to breach a known duty, or conspired to breach a known duty.

Dr. Kalaycioglu's case presents a clear example of the problems that occur because of the confusion among the circuits in this regard. This case involves a fictitious English mutual fund, represented by American agents, purportedly investing through a Grenadian bank, represented by, among others, the Canadian Dr. Kalaycioglu. What law applies to determine the relationship between

the parties and the legal duties owed? United States federal law? State law? English law? Grenadian law? Canadian law? In such a complex situation, does it matter if the defendant reasonably believed that English or Grenadian law applied and acted accordingly, or can the court simply determine the existence of a duty as a matter of United States federal law?

In this case, the jury was instructed that:

> Under the law every agent or employee representing or working for somebody else, that is, the employer, has a duty, it is called a fiduciary duty to act honestly and faithfully in all of his or her dealings with the employer and to transact business in the best interest of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit or kickback the employee expects to derive or has derived from any transaction in which he or she participates in the course of their employment.

[App. 46.] Thus, the instruction in this case treated the nature of the relationship between the parties as a given and the existence of a fiduciary duty as a matter of law, removing that determination from the jury. In effect, the district court conflated the two views of duty, *i.e.*, it required a fiduciary duty, but then decided as a matter of law that all agents or employees owed their employers a fiduciary duty, and defined that duty in all cases as a strict duty of loyalty and disclosure. *See* [App. 35-43.]

By contrast, the defense's proposed jury instruction require the jury first to determine the existence of a fiduciary duty, and then defined fiduciary duty as a term of art in the traditional manner, with language adopted from the civil jury instructions. [App. 31-32.] This was key to Dr. Kalaycioglu's defense on this charge, which was that the commission was not improper under these circumstances,

and at the least Dr. Kalaycioglu reasonably believed such a commission was proper under these circumstances.

According to evidence presented to the court, it is common and legal for management agreements for mutual funds in England to permit the fund manager to accept compensation from the seller of a security that in this country would be considered an illegal "kickback." English mutual funds apparently are not as strictly regulated as they are in the United States; the relationship and the expectations between the investors and the manager of such a fund are quite different than in this country, and are largely determined by the management agreement. However, as the district court determined the existence and scope of the duty as a matter of law, this evidence was never presented to the jury.

This case presents a perfect example of why this Court's guidance is needed on the proper application of § 1346 to the private sector. It squarely presents the questions of what duty is required to trigger application of § 1346, and how that duty is to be determined.

Breach under Section 1346.

"It is important to remember that the breach of a fiduciary duty is not a criminal act. If that were the case, then there would be a complete overlap between civil and criminal law." Paul M. Kessimian, *Business Fiduciary Relationships and Honest Services Fraud: A Defense of the Statute*, 2004 Colum.Bus.L.Rev. 197, 213. "'To justify criminal penalties, the law requires that an actor be blameworthy, or deserving of punishment, and that this "bad state of mind" and the criminal act concur.'" *Id.* (quoting Geraldine Szott Moorhr, *Mail Fraud Meets Criminal Theory*, 67 U.Cin.L.Rev. 19, 20 (1998)). Indeed, this Court addressed this indirectly in *United States v.*

O'Hagan, by stating that mail fraud "has long been held to require deception, not merely the breach of a fiduciary duty." 521 U.S. 642, 654 (1997). Thus, the concept of breach is also intimately connected to the concept of intent.

The circuits are split on whether the defendant must cause or intend to cause actual tangible harm. For example, the Eighth Circuit has stated that this is a requirement because "[w]hen there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated." *Jain*, 93 F.3d at 442. Therefore, the Eighth Circuit also requires proof that the defendant "caused or intended to cause actual harm or injury," which in most cases "means financial or economic harm." *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999). Similarly, in *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006), *pet. for cert. filed*, No. 06-975 (Jan. 16, 2007), the Fifth Circuit Court stated that breach of a fiduciary duty alone is insufficient to support a conviction for honest services fraud; there must be "some detriment to the employer." In *Brown*, the Fifth Circuit vacated the defendants' convictions for honest services fraud because the defendants "breached a fiduciary duty in pursuit of what they understood to be a corporate goal." *Id.* at 522.

By contrast, the Sixth Circuit has expressly ruled that "a defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim." *Frost*, 125 F.3d at 369. Similarly, the Second and District of Columbia Circuits have expressly rejected the need "to show that the defendant intended to cause economic harm to his victim." *Sun-Diamond Growers*, 138 F.3d at 974; *see also Rybicki*, 354 F.3d at 145.

Taking the middle road, the First Circuit states that "[w]hat is required is that 'an articulable harm befall [the victim] as a result of the defendant's activities, or some gainful use must be intended by the [defendant], whether or not this use is profitable in the economic sense." *United States v. Czubinski*, 106 F.3d 1069, 1074-75 (1st Cir. 1997). The Seventh Circuit specifically requires the government to prove "an intent to achieve personal gain" as an element of the offense, *United States v. Bloom,* 149 F.3d 649, 656-57 (7th Cir. 1998), a requirement the Tenth Circuit expressly rejects. *United States v. Welch*, 327 F.3d 1081, 1106-07 (10th Cir. 2003).

Some circuits have required material misrepresentations or omissions, *i.e.*, that the defendant have reason to believe that the information would lead a reasonable employer to change its business conduct. *Rybicki*, 354 F.3d at 142; *Cochran*, 109 F.3d at 667 & n.3; *United States v. Gray*, 96 F.3d 769, 775 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997). Other circuits, including the Eleventh Circuit, only require that the government show that it was foreseeable for the victim to suffer economic harm. *Vinyard*, 266 F.3d at 327-28; *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000); *DeVegter*, 198 F.3d at 1329; *Sun-Diamond Growers*, 138 F.3d at 973-74; *Frost*, 125 F.3d at 368-69; *see also* [App. 45-46].

Even among those circuits that have adopted the foreseeability of harm requirement, that requirement is handled in different ways. Some circuits qualify the foreseeable harm test with an objective reasonableness standard, *i.e.*, requiring that it be reasonably foreseeable that the victim would suffer economic harm. *Sun-Diamond Growers*, 138 F.3d at 974. Others, however, treat this requirement as an aspect of *mens rea,* reasoning that this requirement is preferable because it keeps the focus of the

analysis on the defendant's intent rather than on the response of the alleged victim. *Vinyard*, 266 F.3d at 328; *Frost*, 125 F.3d at 368-69. Similarly, although under Tenth Circuit law intent to inflict economic harm is not an element of the offense, that court has stated that proof of actual or contemplated harm is a means of establishing the necessary intent to defraud. *United States v. Welch*, 327 F.3d 1081, 1104-16 (10th Cir. 2003).

These intercircuit conflicts, all of which relate to the proper standard of intent for honest services fraud, and by implication intent to conspire to commit honest services fraud, are squarely raised by the Eleventh Circuit's decision in this case. All of these intercircuit conflicts present very real and significant dangers which must be addressed. First, there is the danger that federal criminal law will swallow large pieces of commercial law, with potentially devastating consequences for commercial transactions. Second, there is the even more imminent danger that individuals will be convicted in one circuit based on conduct that not only would not violate their own valid commercial agreements, but would not constitute a crime in another circuit. Moreover, the instruction given in this case is not an isolated example, but was based on the Eleventh Circuit's Standard Jury Instruction, which is totally inadequate to inform the jury on the nature of private sector honest services fraud. This Court's guidance is needed to resolve these conflicts, to protect the constitutional rights of individuals charged with this crime, and indeed, the integrity of our legal system.

CONCLUSION

For the reasons set forth above, SERDAR KALAYCIOGLU respectfully petitions this Court for a Writ of Certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

2006 WL 3626874

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12339

D.C. Docket No. 02-80107-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SERDAR KALAYCIOGLU,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(Filed December 11, 2006)

Before TJOFLAT and CARNES, Circuit Judges, and HODGES,* District Judge.

HODGES, District Judge:

Defendant Serdar Kalaycioglu appeals his conviction following a jury verdict of guilty on eleven counts of wire

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

fraud, 18 U.S.C. § 1343, and one count of conspiracy to commit wire fraud, 18 U.S.C. § 371. Kalaycioglu also appeals his sentence of 324 months imprisonment plus an order to pay $6,722,592.29 in restitution. We affirm the conviction and the sentence.

Facts and Background

Kalaycioglu is a naturalized Canadian citizen, a resident of Canada, and an employee of the Canadian Space Agency. He holds a Ph.D. in Engineering, specializing in space robotics and satellite technologies.

According to the superseding indictment and the evidence at trial, from May 2000 to September 2001, Kalaycioglu defrauded residents of Broward and Palm Beach Counties, Florida, by obtaining investment of funds from them on the basis of a false representation, among others, that he was one of only seven traders in the world who was approved and licensed by the United States Federal Reserve to engage in the trading of bank instruments that yielded a very high rate of return. The superseding indictment further alleged, and the evidence proved, that Kalaycioglu became the Chairman of the Board and Chief Executive Officer of Meridian Investment Bank, Ltd. (the "Bank"), an offshore bank licensed in Grenada with its principal place of business in St. George's, Grenada, West Indies, and then fraudulently induced others to invest money with him and the Bank by falsely representing that they would receive a high rate of return on their investment. With regard to the charge of conspiracy to commit wire fraud, the evidence established that Kalaycioglu (and his co-defendants who entered pleas of guilty) conspired to pay a $10,000,000 kickback to an

undercover FBI agent posing as a corrupt securities trader for a fictitious foreign-based mutual fund, and to pay other cooperating witnesses, who posed as corrupt stock promoters, in exchange for the fund's purchase of $40,000,000 in certificates of deposit issued by the Bank.

At trial, the Government presented evidence that Kalaycioglu held himself out to be a highly successful investment trader in monetary instruments that he described, among other things, as "medium term notes," letters of credit, guarantees, and CDs from "prime banks." Kalaycioglu represented that his unique knowledge and ability to trade in these monetary instruments allowed him to offer potential investors high yield investment programs ("HYIPs"). Kalaycioglu explained that he was able to leverage comparably modest sums into huge bank instruments and was thereby able to receive large, risk-free returns on the original investment. Kalaycioglu's claims were bolstered by his purported affiliation with a Montreal law firm that supposedly held all the investor money in trust, thereby protecting the initial investment. Further, Kalaycioglu claimed to be engaged in investment trading for the Canadian government and to have a mandate from the United States Federal Reserve and World Bank to invest in certain humanitarian programs. To support his claimed connections, Kalaycioglu often flashed his Canadian Space Agency identification and an American Express card issued to him by the Canadian government. Kalaycioglu also became involved with the Bank, a financially troubled institution, and then led its principals to believe that the Bank could be turned around through investment in his HYIPs. In return for his assistance, Kalaycioglu was appointed Chairman of the Board and Chief Executive Officer of the Bank.

With the help of numerous false documents, Kalaycioglu convinced several individuals to invest in his HYIPs. Due to his affiliation with the Bank, Kalaycioglu often persuaded these individuals to invest in his HYIPs by buying CDs issued by the Bank. Not surprisingly, the rates of return that Kalaycioglu promised never materialized. When individual investors complained, Kalaycioglu delayed by refunding portions of their money, but ultimately those victims lost substantial sums. Moreover, when the promised high rates of return did not occur, the Bank itself failed. Much of the money paid in by individual investors to purchase the Bank's CDs was funneled to Kalaycioglu through the Canadian law firm's attorney trust account.

The Government also presented evidence that in May 2001 co-defendant Mickelson met with an undercover FBI agent and two cooperating individuals (collectively the "UCs"), who stated to Mickelson that they were employed by a U.S. based representative of the Fund and were seeking high rates of investment return. Mickelson, attempting to secure an influx of cash to help the ailing Bank, told the UCs about the HYIPs touted by Kalaycioglu, as well as CDs they could purchase from the Bank that would allow the fictitious foreign based mutual fund to invest in Kalaycioglu's HYIPs. Following a series of telephone conversations involving Kalaycioglu and his co-defendants, the UCs agreed to have the Fund purchase $40 million of CDs issued by the Bank. In return, the UCs were to receive a $10 million kickback, which the UCs, Kalaycioglu and his co-defendants would deduct from the original $40 million investment and conceal the deduction from the Fund. Kalaycioglu also boldly suggested that the UCs invest their kickback in his HYIPs. When the UCs

asked to see a copy of Kalaycioglu's Federal Reserve license, Kalaycioglu faxed them a copy of his Canadian Space Agency identification and his American Express card issued by the Canadian government. The UCs backed out of the deal before any money changed hands. According to the Government, and unbeknownst to his co-defendants, Kalaycioglu intended to cause a loss of the entire $40 million because he would have funneled the remaining $30 million to himself rather than the Bank.

At the conclusion of trial the jury found Kalaycioglu guilty of eleven counts of substantive wire fraud offenses (18 U.S.C. § 1343) involving separate wire communications and transfers of funds originating in South Florida on specified dates in 2000-2001 as a result of the scheme to defraud. Kalaycioglu was also convicted of the conspiracy count,[1] but was acquitted of two of the substantive wire fraud charges. At sentencing the district court imposed an aggregate commitment term of 324 months and an order of restitution in the amount of $6,722,592.29.

Issues

On appeal, Kalaycioglu raises four issues, attacking both his conviction and his sentence. He contends that (1)

[1] The alleged purpose and object of the conspiracy charged in Count 14 was to "deprive another of the intangible right of honest services," thereby invoking 18 U.S.C. § 1346; and the intended victim of the conspiracy was alleged to be the Fund which would be defrauded "through paying undisclosed kickbacks . . . to others in exchange for their causing the Fund to purchase a large amount of certificates of deposit" issued by Meridian Investment Bank. There was no substantive count relating to this alleged transaction, of course, and none of the other counts involve an allegation of "honest services" fraud under § 1346.

the district court improperly admitted expert testimony, in violation of Federal Rules of Evidence 403 and 704(b), linking Kalaycioglu's conduct to characteristics of a fraudulent financial scheme; (2) the district court improperly instructed the jury on "honest services" fraud (18 U.S.C. § 1346); (3) the district court erred in calculating the amount of loss for purposes of sentencing and restitution; and (4) the district court erred in applying a sentencing enhancement for Kalaycioglu's misrepresentation that he was acting on behalf of a government agency.

Discussion

A. The Expert Testimony of Herbert Biern

One of the witnesses at trial was the senior official in charge of the Federal Reserve's Division of Banking Supervision and Regulation, Herbert Biern, who was not involved in the investigation or apprehension of Kalaycioglu. Biern testified that in mid-1993 he began looking into HYIPs after receiving thousands of inquiries from the public seeking information about their legitimacy. Ultimately, Biern concluded that HYIPs were not legitimate investment vehicles, and he caused the Federal Reserve to issue worldwide warnings about them. Biern also testified that HYIPs do not exist as a legitimate means of earning high rates of returns; that the Federal Reserve does not license or register traders; and that the Federal Reserve does not mandate involvement in any humanitarian programs.

In his testimony, Biern identified what he described as the common characteristics of HYIPs, including: (1) abnormal confidentiality provisions; (2) reference to a limited number or category of banks (such as "prime"

banks) that could perform the investments; (3) unrealistically high rates of return; (4) trading a banking instrument over and over to achieve those returns during a specified period of time; (5) a minimum investment amount; (6) use of legitimate banking instruments in unconventional ways; (7) representations that the funds were safe because they were in an attorney's trust account or were protected by a letter of credit or bank guarantee; and (8) representations that government authorities such as the Federal Reserve, World Bank or International Monetary Fund were involved and that the profits had to be used for humanitarian projects. Biern further testified that he was never able to figure out how HYIPs were supposed to generate the extraordinary investment returns they promised, and that he had never seen anyone make any money through a HYIP.

Following his general testimony, Biern reviewed certain documentary evidence entered by the Government against Kalaycioglu. Biern testified, over objection, that the characteristics of HYIP schemes were present in the documents, but did not go so far as to state that Kalaycioglu's activities were fraudulent. Specifically, Biern examined documents related to a Letter of Credit transaction that Kalaycioglu entered into with Larry Schweiger, one of the alleged victims. Biern testified that the claimed 70% monthly returns in the Schweiger transaction were unrealistic, and that he had never seen a legitimate transaction with a monthly rate of return of 70%. Biern stated that it made no sense that a person could earn $291 million in forty weeks on an initial investment of $10 million. In the documentation related to the Schweiger transaction, Biern also identified references to terms such

as "prime" banks and "40 weeks" as hallmarks of HYIP scams.

Kalaycioglu argues that the admission of Biern's testimony violated Federal Rules of Evidence 704(b) and 403[2] because the witness described a criminal profile – the hallmarks of illegal HYIP scams – and then testified in detail about how Kalaycioglu fit this profile, providing substantive evidence of guilt. Kalaycioglu contends that Biern's testimony, if credited, would necessarily lead the jury to conclude that the expert believed Kalaycioglu's transactions were scams, and that Kalaycioglu had the requisite knowledge and intent to defraud. In response, the Government asserts that the expert testimony at issue here was proper evidence regarding the modus operandi of illegitimate high yield investment scams and enlightened the jury regarding common practices used in those complex fraudulent investment schemes.

"Courts have condemned the use of profiles as substantive evidence of guilt, while acknowledging that there is a fine line between potentially improper profile evidence and accepted specialized testimony." *United States v. Long,*

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[2] "District court rulings on the admissibility of expert testimony are subject to the abuse of discretion standard." *United States v. Dulcio,* 441 F.3d 1269, 1274 n.6 (11th Cir. 2006). "This standard of review requires that we defer to the district court's ruling unless it is manifestly erroneous." *Rink v. Cheminova, Inc.,* 400 F.3d 1286, 1291 (11th Cir. 2005).

Rule 704(b) provides that, "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

328 F.3d 655, 665 (D.C. Cir. 2003) (quoting *United States v. Becker,* 230 F.3d 1224, 1231 (10th Cir. 2000), *cert. denied* 532 U.S. 1000, 121 S. Ct. 1666, 149 L. Ed. 2d 647 (2001) and *United States v. McDonald,* 933 F.2d 1519, 1521 (10th Cir. 1991)); *see also United States v. Quigley,* 890 F.2d 1019, 1022 (8th Cir. 1989) (holding that testimony of a drug courier profile was impermissibly introduced as substantive evidence of guilt); *United States v. Hernandez-Cuartas,* 717 F.2d 552, 555 (11th Cir. 1983) (in which a panel of this court criticized the use of drug smuggler profiles as substantive evidence of guilt, but affirmed the conviction where the subject testimony was used only as background evidence to explain why the defendant was initially stopped and searched by Custom Officials). *Accord United States v. Chastain,* 198 F.3d 1338, 1349 (11th Cir. 1999).

We believe the correct rule in this area was stated by the D.C. Circuit in *Long,* when the Court said:

> [E]xperts may testify regarding the modus operandi of a certain category of criminals where those criminals' behavior is not ordinarily familiar to the average layperson, as in the case of the modus operandi of persons involved in illegal drug trafficking or prostitution. Still, there is a line that expert witnesses may not cross. What is proscribed is questioning that produces responses suggesting some special knowledge of the defendant's mental processes. This line relates to the limits of Rule 704(b) on opinion evidence regarding the ultimate issue. . . ."

328 F.3d at 666 (citations and quotations omitted).

Key to the Government's case against Kalaycioglu was the illegitimacy of HYIPs, as well as the way in which

scams involving HYIPs operate. Thus, under the circumstances of this case, Biern provided highly relevant information directly related to complicated factual issues before the jury. His testimony first educated the jurors concerning the characteristics of HYIPs. Second, Biern described the hallmarks of the modus operandi of persons running a scam involving HYIPs. Third, Biern opined that certain documents related to transactions entered into between Kalaycioglu and his alleged victims contained the hallmarks of illegitimate HYIPs. Critically, however, while Biern described HYIPs as illegitimate, he did not testify that Kalaycioglu engaged in fraud, nor did he testify that a person promoting HYIPs was necessarily engaged in fraud. Indeed, Biern never suggested that he had any special knowledge of Kalaycioglu's mental processes. Moreover, the district court repeatedly gave the jury limiting instructions concerning Biern's testimony, directing them, for example, not to confuse his testimony concerning his background and experience investigating other HYIPs with the facts of this case.

We conclude that the district court properly exercised its discretion in admitting the testimony of Herbert Biern without running afoul of Federal Rule of Evidence 704(b), and also correctly concluded that the probative value of his testimony was not substantially outweighed by prejudicial effect. *See* Fed. R. Evid. 403.

B. Jury Instruction on Honest Services Fraud

Kalaycioglu asserts that the district court committed reversible error when it refused a defense request and instead gave the jury, under 18 USC § 1346, the circuit

pattern jury instruction on "honest services" fraud.[3] Kalaycioglu argues that the instruction as given is fatally flawed because it presumed as a matter of law the existence of a fiduciary duty owed by the supposed mutual fund representatives to the Fund, and did not require the jury to determine the factual nature and existence of such a duty as an essential element of the conspiracy offense.[4]

We find Kalaycioglu's argument unpersuasive for two reasons. First, it ignores the fact that Kalaycioglu and his coconspirators were not charged with a substantive offense involving honest services wire fraud in violation of 18 USC §§ 1343 and 1346; rather, they were charged under 18 USC § 371 with a conspiracy to commit "honest services" wire fraud, and the actual existence of a fiduciary relationship was not an essential element of *that* offense. Indeed, the indictment obviously charged a conspiracy offense and not an "honest services" substantive offense precisely because the Fund did not in fact exist.

Second, while the cases suggest that the district court should ordinarily instruct the jury concerning the elements of the substantive offense or offenses constituting the object of an alleged conspiracy,[5] the district court's instructions in the circumstances of this case were clearly sufficient to meet that obligation.

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[3] Offense Instruction 51.2, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2003).

[4] We review a district court's rulings on jury instructions for abuse of discretion. *United States v. Chastain*, 198 F.3d 1338, 1350 (11th Cir. 1999).

[5] *See United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983); *United States v. Martinez*, 496 F.2d 664, 669 (5th Cir. 1974). *But see United States v. Threadgill*, 172 F.3d 357, 367 & n.8 (5th Cir. 1999).

In *United States v. deVegter,* 198 F.3d 1324 (11th Cir. 1999), we had occasion to review at length the history of honest services fraud as now embodied in 18 U.S.C. § 1346 (which makes no mention at all of fiduciary duties).[6] We observed that in private sector honest services fraud cases, other circuits have held that "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 1329. We also said, in any event, that "[t]he nature and interpretation of the duty owed is a question of federal law," and ultimately concluded that it was unnecessary to decide in that instance "whether a fiduciary duty is necessary in § 1346 private sector cases." *Id.* at 1330. We reach the same conclusion here. There can be no doubt as a matter of law that persons employed to seek out investment opportunities for a mutual fund owe a fiduciary duty to the fund, but whether or not proof of such a duty is a necessary element of an "honest services" wire fraud offense, the district court's instructions to the jury, set out in the margin,[7] constituted

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[6] In its entirety, 18 U.S.C. § 1346 simply states: "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

[7] Let me turn now, then, to the concept of depriving someone of the intangible right to the honest services. [sic.]

To deprive another of the intangible right of honest services means to violate or to cause an employee or agent of another person to violate the employee's or the agent's duty to provide honest services to the employer or the principal.

* * * *

Now, with regard to employers or principals in the private sector, *the Government must prove that the employee or agent intended to breach a fiduciary duty,* and that the employee slash agent foresaw

(Continued on following page)

a fully sufficient and correct charge concerning honest services fraud as an object of the conspiracy alleged in this case.

C. Sentencing Issues

Kalaycioglu appeals his 324-month sentence and order to pay $6,722,592.29 in restitution. We review the district court's application of the Sentencing Guidelines *de novo,* while factual findings are reviewed for clear error. *United States v. Crawford,* 407 F.3d 1174, 1177-78 (11th Cir. 2005). Further, we review the district court's factual findings as to the amount of restitution under the clearly erroneous standard. *United States v. Bourne,* 130 F.3d 1444, 1446 (11th Cir. 1997).

Kalaycioglu asserts (1) that the district court failed to apply the Guidelines correctly in calculating the loss attributable to him as over $40,000,000; (2) that the

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or reasonably should have foreseen that the employer/principal might suffer an economic harm as a result of that breach.

Under the law every agent or employee representing or working for somebody else, that is, the employer, has a duty, it is called a fiduciary duty to act honestly and faithfully in all of his or her dealings with the employer and to transact business in the best interest of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit or kickback the employee expects to derive or has derived from any transaction in which he or she participates in the course of their employment.

A kickback includes any kind of an undisclosed payment or reward to an employee for dealing in the course of employment with the person making the payment so that the employee's personal financial interest interferes with the employee's duty to secure the most favorable bargain for the employer. [Emphasis supplied].

district court erred by ordering restitution on the basis of unreliable evidence; (3) that the district court erred in enhancing his sentence for misrepresenting that he worked on behalf of a government agency; and (4) that the district court committed constitutional error under *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), because the court applied those Guidelines Sentencing enhancements by relying on facts not found by the jury.

i. Loss Calculation

We review for clear error a district court's determination of the amount of loss involved in an offense. *United States v. Nostari-Shamloo,* 255 F.3d 1290, 1291 (11th Cir. 2001). Under U.S.S.G. § 2F1.1(a) (2000), the base offense level for fraud is 6. If the loss exceeded $40,000,000, then the offense level is increased by 17 levels. U.S.S.G. § 2F1.1(b)(1)(R). "[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1 comment. (n.8) (2000). "[O]ften the amount of loss caused by fraud is difficult to determine accurately. Thus, courts may reasonably estimate that amount." *United States v. Miller,* 188 F.3d 1312, 1317 (11th Cir. 1999).

Kalaycioglu's co-defendants, who were affiliated with the Bank and were charged only with conspiracy to commit wire fraud, pled guilty to that charge and their plea agreements specified that the amount of loss resulting from their offense was more than $5,000,000, but less than $10,000,000. Kalaycioglu asserts that the district court violated principles of judicial estoppel in calculating the loss attributable to him as over $40,000,000. Although we

have not previously addressed the applicability of judicial estoppel to facts like those of this case, the Seventh Circuit discussed a similar situation in *United States v. Christian*, 342 F.3d 744 (7th Cir. 2003). In that case, as a result of conduct originating from one incident, three defendants were charged with violations of 18 U.S.C. § 242, the offense of deprivation of rights under color of law which can be charged as a misdemeanor, or as a felony if bodily harm was involved. *See id.* at 747. Two of the defendants entered into plea agreements with the Government and pled guilty to the § 242 charge as a misdemeanor crime. The other defendant proceeded to trial and was convicted of the felony offense. On appeal, he argued that the Government should have been prevented, through the doctrine of judicial estoppel, from presenting evidence of bodily harm at his trial. *Id.* The Seventh Circuit rejected the defendant's argument that the Government's plea agreement with the other defendants constituted an admission by the Government that no bodily injury had occurred, and concluded that judicial estoppel did not prevent the Government from introducing evidence that the defendant on trial committed bodily harm as part of the offense. *See id.* at 749. The Court further explained that, in reaching a plea agreement with a defendant, the Government can offer a plea to a lesser charge or drop certain offenses from the indictment. *Id.* at 748 (noting that a "court must find that the facts support the charge; the facts may prove more than what is charged but not less"). As a result, the Seventh Circuit concluded that judicial estoppel did not restrict the Government's presentation of evidence at trial that the defendant committed a more serious offense than the one to which his codefendants had pled guilty. *See id.* at 748-49.

Kalaycioglu has offered no authority to demonstrate that the doctrine of judicial estoppel prevented the district court from attributing a loss to him that was higher than the loss the court attributed to his co-defendants. Here, the plea agreement into which the Government entered with Kalaycioglu's co-defendants did not constitute an admission by the Government as to the amount of loss attributable to Kalaycioglu. *See Christian,* 342 F.3d at 747-49. The Government was not bound to argue to the district court that the amount of loss attributable to Kalaycioglu was identical to that attributable to his co-defendants. *See id.* Furthermore, there was evidence presented at trial that Kalaycioglu represented that he could place a proposed $40,000,000 investment into his high-yield trading programs, which did not actually exist. Accordingly, the district court did not err in considering the loss attributable to Kalaycioglu as an issue separate from the loss attributable to his codefendants and calculating that loss as greater than $40,000,000.

ii. Restitution

Restitution in this case was required by the Mandatory Victims Restitution Act. 18 U.S.C. § 3663A. As here, where the offense of conviction involved as an element a scheme, conspiracy, or pattern of criminal activity, a "victim" for purposes of the Act is any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern. § 3663A(c)(1)(B); *United States v. Hasson,* 333 F.3d 1264, 1275-76 (11th Cir. 2003). The district court is required to order restitution "in the full amount of each victim's losses," and the court must resolve disputes over the amount of the restitution by a preponderance of evidence. *See* 18 U.S.C. § 3663(e) &

(f)(1)(A); *Hasson,* 333 F.3d at 1276. In determining the appropriate amount of restitution, the district court may consider hearsay evidence that bears "minimal indicia of reliability" so long as the defendant is given an opportunity to refute that evidence. *See Bourne,* 130 F.3d at 1447. To establish that evidence lacks the "minimal indicia of reliability," the defendant must establish: "(1) that the challenged evidence is materially false; and (2) that it actually served as a basis for the sentence." *Id.* (quoting *United States v. Hairston,* 888 F.2d 1349, 1353 (11th Cir. 1989)).

As part of his sentence, the district court ordered that Kalaycioglu pay $6,722,592.29 in restitution, which included $1,420,000.00 to Geoffrey Horne and $600,000.00 to Stephen Renaud. The transactions involving Horne and Renaud were not the subject of charges in the superceding indictment, and Horne and Renaud did not testify at trial. Instead, the Government presented the affidavits of Horne and Renaud, as well as the hearsay testimony of an FBI Special Agent based on his interviews with them and his review of documents that substantiated their transactions and resulting losses. Kalaycioglu did not dispute the underlying transactions, but attempted to establish that he had sent Horne and Renaud funds in an amount that would vitiate the need for restitution.

Kalaycioglu asserts that the district court abused its discretion in assessing restitution for Horne and Renaud because the evidence presented was not sufficiently reliable for the Government to meet its burden by a preponderance of the evidence. Further, Kalaycioglu argues that he was prevented from refuting the evidence relating to Horne and Renaud, because Horne was not made available for cross-examination, and although

Renaud was made available via telephone for cross-examination, Kalaycioglu's counsel's decision to forgo cross-examination due to a scheduling conflict did not operate as an effective waiver of Kalaycioglu's Sixth Amendment right to confrontation.

We find that the district court did not err by relying upon the evidence presented by the Government and ordering Kalaycioglu to pay $2,020,000.00 in restitution to Horne and Renaud.[8] While the FBI Special Agent's hearsay testimony served as the basis for the order of restitution to Renaud and Horne, Kalaycioglu has failed to establish that the hearsay testimony was materially false or otherwise lacking minimal indicia of reliability. Kalaycioglu did not rebut the hearsay testimony of the FBI Special Agent, and the affidavits of Horne and Renaud supported the Agent's testimony. To the extent that Kalaycioglu argues that his counsel was ineffective for declining to cross-examine Renaud due to a scheduling conflict, that issue is not properly before the Court. *See United States v. McLean*, 138 F.3d 1398, 1406 (11th Cir. 1998).

However, although the district court's oral judgment correctly awarded restitution to Renaud, the written judgment incorrectly included only the victims listed in the Pre-sentence Investigation Report. Renaud is not identified as a victim in that Report. Accordingly, a limited remand is necessary to allow the district court to correct

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[8] *See United States v. Dickerson* 370 F.3d 1330, 1342 (11th Cir. 2004) ("[W]e hold that where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme.").

the amended judgment to include Renaud in the restitution order.[9]

iii. U.S.S.G. § 2F1.1(b)(4)(A)

Under U.S.S.G. § 2F1.1(b)(4)(A) (2000), a defendant's offense level should be increased by two levels "[i]f the offense involved . . . a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency." The background to the commentary relating to this provision makes clear that the "guideline is designed to apply to a wide variety of fraud cases." U.S.S.G. § 2F1.1 comment. (backg'd).

According to the testimony presented at trial, Kalaycioglu represented to various investors that he was one of only seven persons in the world that was licensed by the Federal Reserve to engage in a high-yield investment program. Kalaycioglu also informed at least one investor that the Federal Reserve asked him to do humanitarian projects on its behalf and told another investor that he could also participate in these humanitarian programs. Kalaycioglu has offered no authority to support his proposition that the Federal Reserve is not a governmental organization so that his representations about being a Federal Reserve trader should not qualify for a § 2F1.1(b)(4)(A) enhancement. Furthermore, Kalaycioglu represented to some investors that he handled financing matters for the Canadian

[9] *See United States v. Portillo*, 363 F.3d 1161, 1164-65 (11th Cir. 2004) ("Where a sentence that is pronounced orally and unambiguously conflicts with the written order of judgment, the oral pronouncement controls."); *United States v. Bates*, 213 F.3d 1336, 1340 (11th Cir. 2000) (same).

government, or the Canadian military. As evidence of his government affiliation, Kalaycioglu presented potential investors a copy of an identification card issued by the Canadian government and an American Express card issued in his name by the Canadian government. Representations that Kalaycioglu acted on behalf of a foreign government could alone qualify him for a § 2F1.1(b)(4)(A) enhancement. *See United States v. Achiekwelu,* 112 F.3d 747 (4th Cir. 1997); *United States v. Ferrera,* 107 F.3d 537 (7th Cir. 1997).

The district court did not err in enhancing Kalaycioglu's sentence for misrepresenting that he was acting on behalf of a government agency.

iv. Booker Issues

Because Kalaycioglu did not raise a *Booker* claim at his sentencing hearing, we review his claim only for plain error. *See United States v. Dowling,* 403 F.3d 1242, 1246-47 (11th Cir.), *cert. denied,* 126 S.Ct. 462 (2005). Under a plain error analysis, a defendant must show "(1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* at 1247 (quotations omitted). If the defendant is able to make a showing of all three conditions, we then may exercise our discretion to notice the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted). We have held that, in the context of *Booker* error, the plain error test is satisfied only when the defendant can show that "there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of a binding fashion." *Id.* (quotation omitted); *see also United States v. Fields,* 408 F.3d 1356, 1360-61 (11th Cir.) (explaining that a

sentence at the low end of the Guidelines range does not necessarily indicate that the district court would have sentenced the defendant outside of the Guidelines if the court considered the Guidelines as advisory), *cert. denied,* 126 S. Ct. 221 (2005).

In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 17 L. Ed. 2d 435 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington,* 542 U.S. 296, 304, 124 S. Ct. 2531, 2538, 159 L. Ed. 2d 403 (2004), the Supreme Court, examining the state of Washington's sentencing guidelines, held that the imposition of a sentencing enhancement must be supported by facts that were either admitted by the defendant or found by a jury beyond a reasonable doubt. In *Booker,* the Supreme Court extended the reasoning of *Blakely* to the federal Sentencing Guidelines, concluding that the mandatory nature of the Sentencing Guidelines rendered them incompatible with the Sixth Amendment's guarantee to the right to a jury trial. *Booker,* 543 U.S. at 231-35, 125 S. Ct. at 749-51. The Supreme Court concluded that, to preserve Congress's intent in enacting the Sentencing Reform Act of 1984, two specific sections of the Act must be excised – 18 U.S.C. § 3553(b)(1) (requiring a sentence within the Guideline range, absent a departure) and 18 U.S.C. § 3742(e) (establishing standards of review on appeal, including *de novo* review of departures from the applicable Guideline range) – thereby effectively rendering the Guidelines advisory only. *Id.* at 259, 125 S. Ct. at 764.

Based on the Supreme Court's holding in *Booker,* we have stated that there can be two types of *Booker* errors:

(1) a Sixth Amendment, constitutional, error – the error of imposing a sentencing enhancement based on judicial findings that go beyond the facts admitted by the defendant or found by the jury; and (2) a statutory error – the error of being sentenced under a mandatory Guidelines system. *See United States v. Shelton,* 400 F.3d 1325, 1329-31 (11th Cir. 2005).

In this case, it is likely that Kalaycioglu could meet the first two prongs of the plain error test because his sentencing hearing took place in April 2004 under a mandatory Guidelines scheme. Nevertheless, although Kalaycioglu received a sentence at the bottom of his Guidelines range, because Kalaycioglu has not shown – and the record does not indicate – that he would have received a different sentence if the district court had applied the Guidelines in an advisory instead of a mandatory manner, we conclude that Kalaycioglu's substantial rights were not affected by the court's treatment of the Guidelines as mandatory. *See Dowling,* 403 F.3d at 1247; *Fields,* 408 F.3d at 1360-61. Instead, the record shows that the district court specifically considered the factors provided at 18 U.S.C. § 3553(a) and concluded that Kalaycioglu's 324-month sentence was appropriate given those factors. *See United States v. Crawford,* 407 F.3d 1174, 1178-79 (11th Cir. 2005) (explaining that, in sentencing a defendant after *Booker,* district courts must correctly calculate a defendant's Guideline imprisonment range and consult the § 3553(a) factors). Thus, Kalaycioglu cannot satisfy the third prong of the plain error test and there was no *Booker* error in this case. *See Dowling,* 403 F.3d at 1247.

Conclusion

The judgment of the district court, including both the conviction and sentence of Kalaycioglu, is AFFIRMED, except that the district court is directed to correct and reenter the amended judgment as specified in this opinion.

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
	Case Number: 9:02CR80107-004
v.	USM Number: 56304-004
SERDAR KALAYCIOGLU	Counsel For Defendant: Benedict F. Bushne, Esq.
	Counsel For The United States: AUSA Roger Sulis and AUSA Carolyn Bell
	Court Reporter: Pauline Stipes

The defendant was found guilty on Counts 1-7; 10-14 of the Superseding Indictment on January 22, 2004. The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1343	Wire Fraud.	June 12, 2001	1-7 and 10-13
18 U.S.C. § 371	Conspiracy to commit wire fraud	July 31, 2001	14

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 8 and 9 of the Superseding Indictment.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed

by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/26/2004

/s/ Daniel T.K. Hurley
DANIEL T.K. HURLEY
United States District
Judge

April 10th, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 324 months. This term of imprisonment consists of a term of 60 months as to each of Counts 1 through 5 of the Superseding Indictment and a term of 24 months as to Count 6 of the Superseding Indictment, to be served consecutively; and a term of 60 months as to Count [sic] and 7 and Counts 10 through 14 of the Superseding Indictment, to be served concurrently and concurrent to Counts 1 through 6 of the Superseding Indictment.

The Court makes the following recommendations to the Bureau of Prisons:

> The court recommend [sic] the term of imprisonment be served at a facility in South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By: Deputy U.S. Marshal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12339-JJ

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SERDAR KALAYCIOGLU,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Jan. 31, 2007)

BEFORE: TJOFLAT and CARNES, Circuit Judges, and HODGES,* District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-80107-Cr-HurleyVitunac

DEFENDANT'S REQUESTED SPECIFIC INSTRUCTION NO. 5

PROPOSED REVISED OFFENSE INSTRUCTION NO. 51.2
Wire Fraud
Depriving Another Of
Intangible Right Of Honest Services
18 U.S.C. §§ 1343 & 1346

Title 18, United States Code, Sections 1343 and 1346, make it a Federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to fraudulently deprive another of an intangible right of honest services.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant knowingly devised or participated in a scheme to fraudulently deprive [the public] [another] of the intangible right of honest services, as charged;

Second: That the Defendant did so willfully with an intent to defraud; and

Third: That the Defendant transmitted or caused to be transmitted by wire in interstate commerce some communication for the purpose of executing the scheme to defraud.

The word "scheme" includes any plan or course of action intended to deceive or cheat someone; and to act

with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

To "deprive another of the intangible right of honest services" means to violate, or to cause [a public official or employee] [an employee or agent of another person] to violate, the employee's or agent's duty to provide honest services to the employer or principal.

[Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the [official] [employee] acts or makes [his] [her] decision based on the official's own personal interests – such as accepting a bribe, taking a kickback or receiving personal benefit from an undisclosed conflict of interest – the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss in the transaction.]

[With regard to employers in the private sector, the Government must prove both that the employee or agent intended to breach a fiduciary duty, and that the employee or agent foresaw, or reasonably should have foreseen, that the employer or principal[6] might suffer an economic harm as a result of that breach.]

With regard to proof of breach of a fiduciary duty, the Government must first establish the existence of the fiduciary duty and that the employee or agent understood that the duty existed, and what the employee or agent

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[6] Depending on whether it is an alleged employee/employer or agent/principal relationship.

understood its nature and scope to be. A fiduciary obligation exists whenever one person – here, the employer or principal – places special trust and confidence in another person – here, the employee or agent – and relies upon the fiduciary to exercise discretion or expertise in acting for the employer/principal; and the fiduciary knowingly accepts that trust and confidence and thereafter undertakes to act on behalf of the employer/principal by exercising the fiduciary's own discretion and expertise.

Under the law, an agent or employee representing or working for someone else – the employer/principal – may have a heightened duty to act honestly and faithfully in all of his or her dealings with the employer/principal, and to transact business in the best interest of the employer/principal.

Of course, the mere fact that a business relationship comes into being between two persons does not mean that either owes a fiduciary obligation to the other. If one person engages or employs another and thereafter directs or supervises or approves the other's actions, the person so employed is not a fiduciary. Rather, it is only when one party reposes, and the other accepts, a special trust and confidence involving the exercise of professional expertise and discretion, that a fiduciary relationship comes into being.[7]

This fiduciary duty may include a duty to make full and fair disclosure to the employer/principal of any personal interest or profit [or "kickback"] the employee or agent expects to derive or has derived from any transaction in

[7] Taken from Civil Pattern Instruction 4.3.

which he or she participates in the course of the employment. That obligation may be implicit or it may be explicitly agreed to or required. Or, it may be changed or limited explicitly or implicitly. In sum, it will be for you to decide beyond a reasonable doubt, based on the evidence, whether such a fiduciary duty existed, the nature and scope of that duty, and whether the employee or agent knew that he had a disclosure duty to the employer/principal and what the employee or agent's understanding was of the nature and scope of that particular obligation.

[A "kickback" includes any kind of undisclosed payment or reward to an employee or agent for dealing in the course of employment with the person making the payment so that the employee's personal financial interest interferes with the employee's duty to secure the most favorable bargain for the employer/principal.]

The Government must also prove, in addition to proof of intent to breach a fiduciary duty of disclosure, that the employee or agent foresaw, or reasonably should have foreseen, that the employer/principal might suffer an economic harm as a result of that breach. With regard to this second requirement, the Government must prove that there was a failure by the defendant to disclose something which in his knowledge or contemplation posed a business risk of harm or loss to the employer/principal. If you find, in addition to a finding of breach of a fiduciary duty of disclosure of compensation, that the nondisclosure of a conflict of interest by the defendant furthered a scheme to abuse the trust of the employer/principal in a manner that made an identifiable harm to the employer/principal reasonably foreseeable, then you may find that the defendant had the intent to defraud under Section 1343. The key determination is whether you can find from the

evidence presented in this case that the defendant might reasonably have contemplated or understood that the employer would suffer some harm to its business.[8]

It is not necessary that the Government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme; or that the material transmitted by wire was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone;[9] or that the use of interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the defendant personally used the wire communication facility.

What must be proved beyond a reasonable doubt is that the Defendant, with the specific intent to defraud, knowingly and willfully devised, intended to devise, or participated in a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the interstate wire communications facilities was closely related to the scheme because the Defendant either used or caused to be used, wire communications facilities in interstate in an attempt to execute or carry out the scheme.

To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of such

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[8] Adapted from *United States v. Frost*, 125 F.3d 346, 367-368 (6th Cir. 1997).

[9] This clause incorporates the following sentence from the *Frost* instruction which is omitted above: "However, the government is not required to prove that the intended victim, the employer, actually suffered a loss of money or property."

facilities will follow in the ordinary course of business or where such use can be reasonably foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	Docket No. 02-80107-CR-HURLEY
Plaintiff,	)	West Palm Beach, Florida January 13, 2004
vs.	)	
SERDAR KALAYCIOGLU	)	
Defendant.	) x	

COURT REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS HAD BEFORE JUDGE DANIEL T. K. HURLEY AND A JURY

APPEARANCES:

For the Government:	ROGER H. STEFIN, ESQ. CAROLYN BELL, ESQ. Assistant U.S. Attorney
For Defendant:	BENEDICT P. KUEHNE, ESQ.
Court Reporter:	Pauline A. Stipes, C.S.R., C.M.

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[4113] MR. STEFIN: Objection; beyond the scope of my question. My question was –

THE COURT: What was the question, that he dropped the lawsuit?

MR. STEFIN: No. My question was he deposited five million dollars with the Defendant.

THE COURT: I think your question was, did he claim he deposited five million. What was your answer to that, Dr. Kalaycioglu?

THE WITNESS: He claimed in the legal suit, he instituted a legal action against me, and he claimed that he deposited funds of five million dollars at one point, or close to five. I am not sure how much he did.

BY MR. STEFIN:

Q. And you –

THE COURT: Mr. Stefin, I am sorry, we are at a point where we need to stop for the evening recess. Why don't we adhere to our schedule, and we will come back tomorrow morning and continue with the cross examination.

Let me ask the jury, please be careful, don't talk about the case or let anyone talk with you about the case. See you tomorrow morning at 9:30.

(Thereupon, the jury left the courtroom.)

THE COURT: Ladies and gentlemen, let's take a [4114] five to ten minute break, and what I would like to do is revisit this issue we wrestled with last night on the honest services fraud aspect, see if we can't resolve that, and take any other issues that we need to discuss.

Let's take a ten minute break, okay?

(Thereupon, a short recess was taken.)

(Thereupon, trial reconvened after recess.)

THE COURT: All set, everybody? Why doesn't everybody sit down for a minute.

Let me tell you what my thinking is, and then I would like to have the benefit of any reactions or responses that you have.

The Eleventh Circuit in its decision in the DeVetger case, 198 Fd.3rd, 1324, dealt with a fellow who is retained by a county commission to give that county commission advice regarding the issuance of a bond or refinancing of a bond. And, of course, the allegations are that one of the people who sought to be the brokerage house or whatever laissez-faire was going to do, entered into an arrangement with this fellow to compensate him so he would manipulate the system to favor this one particular investment banker.

And The Court in the course of its discussion, understanding that it was dealing with, if you will, a quasi public person, because clearly DeVetger, even [4115] though a private individual, was rendering services to a public entity.

The Court discussed the type of proof that would be required when dealing with a private sector employee. And although I suspect most of its discussion would today be regarded as dicta, this is our appellate court.

And certainly The Court, this court, must very carefully look at the discussion of these topics. Judge Black, who was the author of the opinion, is a distinguished member of the Eleventh Circuit, judge who is noted for her care and scholarship, and what is significant is that in this case The court ultimately concludes, not in dicta but reaching the conclusion a private section of the 1346,

honest services of fraud breaches a fiduciary duty and foresees economic harm.

As Ms. Bell pointed out last night, and I think her suggestion is reasonable, the drafters of the pattern jury instructions who are a committee of judges and lawyers have given us a proposed pattern jury instruction which, I think is fair to suggest, is modeled and takes much from the Eleventh Circuit's opinion in DeVetger in that it indicates for a private sector wire fraud conviction there must be a fiduciary duty, and there must be reasonably foreseeable economic [4116] harm.

Now, other courts have looked at these issues and most significantly United States Court of Appeals for the Second Circuit in an en banc decision – let me see if I could put my hand on it now, I have a lot of paper here.

In the case of United States versus Rybicky, and again, forgive me because I have a couple copies of that, and I would like to get my copy, I have one that I underlined. But what I think is significant in Rybicky, and remember Rybicky is an en banc decision that was examining whether 1346 was unconstitutionally vague, because in the Second Circuit, the Second Circuit had expressly concluded that a breach of a fiduciary duty was not required, rather, what you had to show was a breach of a duty of loyalty, which is a lesser standard.

And The Court went on and developed even a different standard other than the reasonably foreseeable economic harm.

Now, what I think the pattern jury instruction does is this: The pattern jury instruction picks up the Eleventh Circuit's conclusions regarding a fiduciary duty, the need

for a fiduciary duty, but I suggest it turns around and defines a fiduciary duty by a much lower standard.

[4117] Now, again, last night Ms. Bell said, well that may be true. What they've done is, they have given us what is a fiduciary duty for this statute. Here's what I think the pattern jury instruction does, and please understand, this is an area where the appellate court clearly will go back at some point in the future and look at it just as the Second Circuit did because it is not until these issues get joined, and there is an opportunity, really, to reflect on these issues that the focus becomes sharper.

And certainly Judge Black's opinion which picks up on a statement from Justice Stevens' dissent, dissent in the Supreme Court opinion in McNally, I believe, Justice – Judge Black, quoting Justice Stevens' notes the principal third in the private sector purchasing agents, brokers, union leaders and others with clear fiduciary duties to their employers or unions were found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information. And that is a quotation from the Supreme Court's opinion in McNally but from Justice Stevens' dissenting opinion.

The Eleventh Circuit has talked about fiduciary duty. It has also talked about 1346 is not limited to such conduct but extends to defrauding of some private sector duties of loyalty.

[4118] Now, I think the Eleventh Circuit pattern jury instruction is wrong in this sense. It has upped the anti for the Government to have to prove the violation of a fiduciary duty, something you don't have to prove in the Second Circuit. But it has lowered the anti, if you will, by turning

around and defining fiduciary duty as essentially a duty of loyalty.

I start out with this view: When you have a term like the concept of fiduciary duty that is in fact a well recognized term of art, a legal term of art, I would suggest to you that it is not reasonable to believe that an institution like the Eleventh Circuit would use that term and not mean its well accepted meaning unless The Court would clearly state that.

In other words, if the Eleventh Circuit was suggesting that in this context the obligations imposed by a fiduciary duty are somewhat less, I don't mean to say watered down, but I think that is what I am saying, than normally exists, I think The Court would have told us that, and they did not.

So in the Eleventh Circuit we have some very strong dicta that you need a fiduciary relationship.

Having said that, as Mr. Kuehne pointed out, the pattern instruction then says that under the law every employee who works for somebody else is in fact a [4119] fiduciary. I mean, that is what the pattern jury instruction says, to the extent that they must act honestly and faithfully in all of their business dealings regarding the employer and so on.

That is not a fiduciary relationship. That is the duty of loyalty that the Second Circuit talks about. That is a lesser duty.

So I think on the one hand, as I said, the pattern jury instruction clearly attempting to implement the dictates, albeit in dicta of the Eleventh Circuit, says the Government has to establish there is a fiduciary relationship, but

then at the same time the pattern jury instruction has turned around and defined that fiduciary obligation as something that I think is much less than would normally be found than in the traditional fiduciary relationship.

Now, for what it is worth, and quite candid, I believe the Second Circuit has grappled with this in a more comprehensive fashion and the Second Circuit has pointed out its view that 1346 was amended to reimpose the kind of liability that existed prior to the Supreme Court's announcement in McNally, that is the first premise, and the Eleventh Circuit makes that very same statement.

The Court then goes on and says that every [4120] employee has an obligation of loyalty to their employer, and that 1346 as applied in the facts in Rybicky is broad enough to cover that particular situation. In other words, there need not be a fiduciary duty, there has to be the duty of loyalty.

Ms. Bell last night talked about the employee in 7/Eleven who doesn't clearly have a fiduciary obligation to their employer, but has some obligation, whether it is an obligation of care, an obligation of loyalty, and if you can show that there was a scheme where someone else entered into a conspiracy with that employee to do some act that was beneficial to the conspirators and detrimental to the employer, even though it doesn't involve a breach of a traditionally recognized fiduciary duty, in my judgment, that would be enough and to fall within the ambit of 1346.

Now, let me tell you what my final ruling on this is, and what I am inclined to do.

I am inclined to give the Eleventh Circuit pattern jury instruction as is because though I think it is wrong in

saying that the Government has to prove the existence of a fiduciary duty, if we mean that to be a fiduciary duty in the traditional sense, the definition it gives of a fiduciary duty is a much more general definition, and is the correct definition, and is the [4121] exact definition that would be accepted by the Second Circuit in the Rybicky decision.

I think what I will do is allow the appellate court, if it has the opportunity to view this issue, to refine it. I don't think anyone is harmed by giving the pattern jury instruction, and as I said before, in one sense it raises the anti for the Government, that is by proving the fiduciary relationship, but lowers the anti [sic] on the other side but defines the fiduciary duty in much more generic terms, in much more all inclusive terms.

So for all of those reasons, I think it would be best and I think that it, frankly, ultimately ends up in a correct statement of what is really the law to give the pattern jury instruction.

The thing that I think is wrong with the pattern jury instruction is the use of the term fiduciary duty. It is a loose use, if you will, of what is clearly a term of art.

I've looked at cases and I know you have, too, on both sides. There is a case out of the Second Circuit called United States versus Santora, 302 Fd.3rd, 76, which points out that there is no general fiduciary duty inherent in an ordinary broker customer relationship. And I suspect we can think of a multitude of examples where there is no general fiduciary duty.

[4122] But that is not to suggest you couldn't have an application of the wire fraud statute if in fact somehow that employee was induced to breach their duty of loyalty

and care to the employer. Some folks down the road with much more scholarship and research would have to refine this.

I don't think we are doing harm to anybody by giving the pattern jury instruction. Although I think it is flawed, I don't think it misleads anybody, and I don't think it in any way lowers the barrier in a way that would harm the Defendant, because I think it is a correct statement of the law, albeit with the imprecise usage of the term fiduciary obligation.

So my inclination is to give the pattern Eleventh Circuit standard jury instruction in this area.

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

UNITED STATES OF AMERICA	) Docket No. 02-80107-CR-HURLEY
Plaintiff,	) West Palm Beach, Florida
vs.	) January 16, 2004
SERDAR KALAYCIOGLU	)
Defendant.	) x

COURT REPORTER'S TRANSCRIPT OF
TESTIMONY AND PROCEEDINGS HAD BEFORE
JUDGE DANIEL T. K. HURLEY AND A JURY

APPEARANCES:

For the Government:	ROGER H. STEFIN, ESQ. CAROLYN BELL, ESQ. Assistant U.S. Attorney
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[4638] Count 14 is similar to the wire fraud alleged in the substantive counts of 1 through 13, but it is different in some important ways, and I want to try to point out those differences.

Federal law makes it a crime or offense for anybody to knowingly and willfully, with the intent to defraud, to use interstate wire communications facilities in carrying out a

scheme to fraudulently deprive another of what is called an intangible right of honest services. Intangible right of honest services.

Now, I've already defined some terms for you. For instance, scheme to defraud, intent to defraud, and so on, all of those definitions apply here.

I've also previously explained to you what it means to cause interstate wire communications facilities to be used.

Let me turn now, then, to the concept of depriving someone of the intangible right to the honest services.

To deprive another of the intangible right of honest services means to violate or to cause an employee or agent of another person to violate the employee's or the agent's duty to provide honest services to the employer or the principal.

With regard to employers and principals in the [4639] private sector – let me just stop for a minute.

Sometimes you can allege this in terms of people who are trying to bribe public officials. That is not what anybody is contending here. What the Government is contending here is that there was a conspiracy to cause the managers of this fictitious mutual fund to deprive the investors of the honest services of their managers.

That is what the Government is claiming.

Now, with regard to employers or principals in the private sector, the Government must prove that the employee or agent intended to breach a fiduciary duty, and that the employee slash agent foresaw or reasonably

should have foreseen that the employer/principal might suffer an economic harm as a result of that breach.

Under the law every agent or employee representing or working for somebody else, that is, the employer, has a duty, it is called a fiduciary duty to act honestly and faithfully in all of his or her dealings with the employer and to transact business in the best interest of the employer, including a duty to make full and fair disclosure to the employer of any personal interest or profit or kickback the employee expects to derive or has derived from any transaction in which he or she participates in the course of their [4640] employment.

* * *